

SOUTHERN OHIO COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-824

Decided November 7, 1997

Appeal from a decision by Administrative Law Judge David Torbett dismissing application for review of cessation order No. 93-070-405-001.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure:
Generally—Surface Mining Control and Reclamation Act of 1977: Cessation Orders:
Generally

An application for review of a cessation order not filed within 30 days of receipt thereof was properly dismissed as untimely filed, under 43 C.F.R. § 4.1162.

APPEARANCES: D. Michael Miller, Esq., Mark S. Stemm, Esq., and Charles H. Cooper, Esq., Columbus, Ohio, for Appellant; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Southern Ohio Coal Company (SOCCO) has appealed from a June 22, 1994, Decision issued by Administrative Law Judge David Torbett that dismissed as untimely filed SOCCO's application for review of cessation order No. 93-070-405-001, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 28, 1993. The application for review was filed with the Hearings Division of this Department on May 6, 1994. Departmental regulation 43 C.F.R. § 4.1162 provides, however, that applications for review of cessation orders shall be filed "within 30 days of receipt." 43 C.F.R. § 4.1162(a). No extension of time for such filings is allowed. 43 C.F.R. § 4.1162(b). The application filed by SOCCO was late by this standard, but SOCCO argues that the late filing should be excused "in this most unique case" because SOCCO had chosen to initiate Federal court litigation instead of pursuing its administrative remedies. See Application for Review at 1, incorporated in Brief of Appellant at 1.

As SOCCO explains in the 1994 application for review, SOCCO sought injunctive relief from the cessation order in a United States district court on July 29, 1993. Initially successful in the district court, where OSM was enjoined from enforcement of the cessation order, SOCCO met with reversal on April 8, 1994, when the court of appeals found that the district court lacked jurisdiction to enjoin enforcement of OSM's order because SOCCO had not exhausted its administrative remedies. Southern Ohio Coal Co. v. OSM, 20 F.3d 1418, 1425, 1427 (6th Cir. 1994). There is no dispute concerning the action taken by the reviewing court following issuance of the injunction by the district court in 1993. Nevertheless, relying upon language appearing in the overruled district court's order, SOCCO now argues, as was done before Judge Torbett, that since the district judge found OSM's cessation order was a "nullity," this characterization somehow negated the prohibition against extensions of time for filing applications for review appearing in Departmental regulation 43 C.F.R. § 4.1162(b). See Application for Review at 3; Brief of Appellant at 2; Reply Brief at 2.

In support of the position that there should be no penalty for choosing to seek injunctive relief from the Federal courts instead of pursuing the administrative remedy provided by 43 C.F.R. § 4.1162, SOCCO cites U.S. v. Mancuso, 139 F.2d 90 (3d Cir. 1943), a decision reviewing a criminal conviction based on disobedience of an order to report for induction into the Army issued on March 26, 1943, by a district judge. The reviewing court of appeals found that Mancuso's criminal conviction could not be sustained, however because of the existence of an order by another district court judge issued on March 5, 1943, which remained in effect, that enjoined Mancuso's draft board from inducting him. The court determined that Mancuso was entitled to rely upon the continuing injunction in this confusing situation, because "until the order of March 5 was vacated, either by the Judge who entered it or in some other fashion, it stood and the litigant can hardly be asked to determine at his peril the correctness of the court's decision." Id. at 92. This case provides no useful precedent in the matter presently before us for review, since there is no question here that the district court's order was annulled and, unlike the situation in Mancuso, there is no conflicting order to which SOCCO can point for continued reliance upon the 1993 district court injunction.

[1] It is not disputed that SOCCO did not file an application for review of the cessation order issued by OSM in July 1993 until May 1994. Because that filing did not occur within the 30-day period allowed by regulation, and because the limitation imposed by the regulation may not be waived, SOCCO's application was properly denied. 43 C.F.R. § 4.1162; McPeck Mining v. OSM, 101 IBLA 389, 393 (1988) and cases cited therein. Judge Torbett was required, therefore, to dismiss SOCCO's late-filed application; SOCCO has not found error in his decision doing so.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge

